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No. 89-265

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1989

EASTON PUBLISHING COMPANY,

Petitioner,

v.

ALFRED R. BOETTGER,

Respondent.

On Petition for a Writ of Certiorari
to the Supreme Court of Pennsylvania

BRIEF *AMICI CURIAE* OF *THE PHILADELPHIA INQUIRER*, *PHILADELPHIA DAILY NEWS*, *PITTSBURGH POST-GAZETTE*, *THE PITTSBURGH PRESS*, AND PENNSYLVANIA FIRST AMENDMENT COALITION IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*

This brief is submitted on behalf of five *amici curiae*, representing a cross-section of the news media in Pennsylvania. The amici are *The Philadelphia Inquirer*, the *Philadelphia Daily*

News, Pittsburgh Post-Gazette, The Pittsburgh Press, and the Pennsylvania First Amendment Coalition.*

These *amici* have a profound interest in this litigation because they or their members publish or broadcast daily news stories that reflect information from open court records. The Pennsylvania Supreme Court's decision below imposes civil liability for accurately reporting information derived from open judicial records, despite the special First Amendment protection this Court has repeatedly accorded such news reports. The decision below thus poses a grave threat to the *amici,* exposing them to liability in violation of this Court's precedents and thereby discouraging them from delivering to the public constitutionally protected news stories. For these reasons, the *amici* fully support petitioner Easton Publishing Company's request that this Court correct the Pennsylvania Supreme Court's far-reaching infringement of First Amendment protections.

The Philadelphia Inquirer and the *Philadelphia Daily News* are newspapers of general circulation, published in Philadelphia, Pennsylvania, by Philadelphia Newspapers, Inc., a subsidiary of Knight-Ridder, Inc. The *Pittsburgh Post-Gazette* is a newspaper published in Pittsburgh, Pennsylvania, by PG Publishing Co. Another Pittsburgh newspaper, *The Pittsburgh Press,* is published by the Pittsburgh Press Company. The final *amicus,* Pennsylvania First Amendment Coalition, is a nonprofit corporation organized under the laws of Pennsylvania to preserve, protect, and defend First Amendment rights. The Coalition consists of approximately 60 newspapers published in Pennsylvania, numerous Pennsylvania radio and television stations, and several media-related organizations.

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*Written consent to the filing of this brief, signed by all parties, has been filed with the Clerk of the Court pursuant to this Court's Rule 36.

ARGUMENT

I. THE PENNSYLVANIA SUPREME COURT'S DECISION IS IN CONFLICT WITH THIS COURT'S DECISIONS.

This Court has repeatedly emphasized the "special protected nature of accurate reports of judicial proceedings" and records. *Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469, 492 (1975). *See Oklahoma Publishing Co. v. District Court,* 430 U.S. 308, 310-311 (1977); *Nebraska Press Association v. Stuart,* 427 U.S. 539, 568 (1976). *See also The Florida Star v. B.J.F.,* 57 U.S.L.W. 4816, 4818 (U.S. June 21, 1989); *Landmark Communications, Inc. v. Virginia,* 435 U.S. 829, 840 (1978). In fact, the Court has unequivocally held that "the First and Fourteenth Amendments will not allow exposing the press to liability for truthfully publishing information released to the public in official court records." *Cox*, 420 U.S., at 496. Wholly ignoring this mandate, the Pennsylvania Supreme Court's decision below imposes liability on a newspaper for accurately reporting the contents of a transcript appearing in a court file open to the public.

In its decision below, the Pennsylvania Supreme Court developed an unprecedented "intent of the official" standard for assessing whether the media may be held liable for publishing information appearing in public court records. *See* Appendix B to Petition for Writ of Certiorari to the Supreme Court of Pennsylvania, at 10b. Under this novel standard, the media are protected from liability only where information published is "of a type legally and publicly obtainable either from official court records *intentionally* placed in the public domain, or from information readily obtainable through attendance in open court." *Id.* (emphasis in original). Petitioner here, the court determined, was properly held liable for publishing quotes from the transcript found in an open court file because the transcript "was neither readily obtainable in open court nor *intentionally* placed in records accessible to the general public." *Id.* (emphasis in original).

Under the decision below, the media's liability for publishing information obtained from public court records depends solely on a factor beyond its control: the intent of the government official who placed the information in the records. Where, as here, the official unintentionally placed the information in the public domain, any member of the press publishing the information must answer to individuals aggrieved by the official's mistake. Whether acting with or without fault, the press thus becomes the indemnitor of government misconduct. Such a result is directly at odds with this Court's precedents, under which the actual intent of an official who included information in public records is irrelevant. *See Florida Star*, 57 U.S.L.W., at 4819-4820 (even where government's release of information to the press was inadvertent, it is anomalous to sanction entities other than the government representatives who were the source of the release); *Cox*, 420 U.S., at 495 ("[b]y placing the information in the public domain on official court records, the State must be presumed to have concluded that the public interest was thereby being served"). *See also Smith v. Daily Mail Publishing Co.*, 422 U.S. 97, 103 (1979).

II. THE PENNSYLVANIA SUPREME COURT'S DECISION WILL HAVE FAR-REACHING, ADVERSE CONSEQUENCES.

By imposing strict liability for accurate reports of official court records, the Pennsylvania Supreme Court has transformed an area of news reporting formerly subject to constitutional privilege into a minefield of risks for the press. Indeed, the decision below contains nothing confining its scope to matters relating to wiretapping and surveillance.

Like the laws of other states, Pennsylvania's statutes are permeated with provisions that may give rise to civil or criminal liability for disclosure of confidential information.* Under the

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**See, e.g.*, 18 Pa. Cons. Stat. Ann. §9121(b)(2) (limiting circumstances under which an individual's criminal history may be disseminated to the public); 42 Pa. Cons. Stat. Ann. §4549(b) (providing that certain persons revealing information about grand jury proceedings shall be in contempt of

decision below, members of the press may be held liable for the actions of public officials who violate these provisions by placing protected material in public court records.

Reporters can no longer rely on the "special protected nature" of court records. *Cox*, 420 U.S., at 492. Instead, a reporter wishing to convey newsworthy information contained in open court records is now burdened with a complex series of inquiries: (i) determining whether the information could be subject to a confidentiality law; (ii) identifying the public official who placed the information in the records; and (iii) ascertaining the intent of the official in placing the information there. If the reporter concludes that the official acted improperly, or at least inadvertently, then the decision below requires the reporter to engage in self-censorship, despite the availability of the information to any citizen who asks to inspect the court records. This Court's intervention is needed to reverse such a far-reaching encroachment on the media's ability to report news to the public.

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court); 42 Pa. Cons. Stat. Ann. §5988 (providing penalties for disclosure of the name of child victims of sexual or physical abuse); 62 Pa. Stat. Ann. §404(a) (limiting information that may be disclosed concerning recipients of public assistance and limiting manner in which disclosed information may be used); 72 Pa. Cons. Stat. Ann. §7274 (providing penalties for "divulging" certain tax information gathered by the department of revenue).

CONCLUSION

The *amici* respectfully urge the Court to grant Easton Publishing Company's Petition for a Writ of Certiorari and to set the matter for oral argument. In the alternative, the *amici* support Easton Publishing Company's request for the Court to grant the Petition and to summarily reverse the decision of the Pennsylvania Supreme Court.

Respectfully submitted,

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APPENDIX

TEXT OF CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. Amend. I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble and to petition the Government for a redress of grievances.

U.S. Const. Amend. XIV, §1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws

18 Pa. Cons. Stat. Ann. §9121(b)(2):

> (b) Dissemination to noncriminal justice agencies and individuals. — Criminal history record information shall be disseminated by a State or local police department to any individual or noncriminal justice agency only upon request:
>
> * * * *
>
> (2) Before a State or local police department disseminates criminal history record information to an individual or noncriminal justice agency, it shall extract from the record all notations of arrests, indictments or other information relating to the initiation of criminal proceedings where:
>
> (i) three years have elapsed from the date of arrest;
> (ii) no conviction has occurred; and
> (iii) no proceedings are pending seeking a conviction.

42 Pa. Cons. Stat. Ann. §4549(b):

(b) Disclosure of proceedings by participants other than witnesses. — Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys for the Commonwealth for use in the performance of their duties. The attorneys for the Commonwealth may with the approval of the supervising judge disclose matters occurring before the investigating grand jury including transcripts of testimony to local, State, other state or Federal law enforcement or investigating agencies to assist them in investigating crimes under their investigative jurisdiction. Otherwise a juror, attorney, interpreter, stenographer, operator of a recording device, or any typist who transcribes recorded testimony may disclose matters occurring before the grand jury only when so directed by the court. All such persons shall be sworn to secrecy and shall be in contempt of court if they reveal any information which they are sworn to keep secret.

42 Pa. Cons. Stat. Ann. §5988:

(a) Release of name prohibited. — In a prosecution involving a child victim of sexual or physical abuse, unless the court otherwise orders, the name of the child victim shall not be disclosed by officers or employees of the court to the public, and any records revealing the name of the child victim will not be open to public inspection.

(b) Penalty. — Any person who violates this section commits a misdemeanor of the third degree.

62 Pa. Stat. Ann. §404(a):

(a) The department shall have the power to make and enforce regulations:

(1) To protect the names of applicants for and recipients of public assistance from improper publication, and to restrict the use of information furnished to other agencies or persons to purposes connected with the administration of public assistance. Upon request by any adult resident of the

Commonwealth, the department may furnish the address and amount of assistance with respect to persons about whom inquiry is made; but, information so obtained shall not be used for commercial or political purposes; and, no information shall be furnished regarding any person's application for, or receipt of, medical assistance.

(2) To protect the rights and interests of persons about whom personal or confidential information is in its possession.

72 Pa. Cons. Stat. Ann. §7274:

Any information gained by the department as a result of any return, examination, investigation, hearing or verification, required or authorized by this article, shall be confidential, except for official purposes and except in accordance with proper judicial order or as otherwise provided by law, and any person unlawfully divulging such information shall be guilty of a misdemeanor, and upon conviction thereof, shall be sentenced to pay a fine not in excess of one thousand dollars ($1000) and costs of prosecution, or to undergo imprisonment for not more than one year, or both.